Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

SKYE LEONARD, A MINOR, BY AND THROUGH HIS GUARDIAN AD LITEM, REBECCA LEONARD; DONALD LEONARD; REBECCA LEONARD; BRIELLE LEONARD, A MINOR, BY AND THROUGH HER GUARDIAN AD LITEM, REBECCA LEONARD,
Petitioners,

v.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is a clause in a Release and Settlement Agreement limiting arbitration to "any disagreement(s) ... regarding payment of **claims** for medical expense reimbursement under the Policy" so inclusive as to obliterate the distinction between "**coverage**" and "**claims**"?

2. Does a clause in a Release and Settlement Agreement, resolving an insurance bad faith lawsuit, which states that "any disagreement(s) ... regarding payment of **claims** for medical expense reimbursement under the Policy" must be arbitrated provide constitutionally adequate notice that petitioners have waived their constitutional right to a jury trial as to causes of action arising when no medical expense reimbursement **claims** were pending and which causes of action were based on an insurer's cancellation of the policy (**coverage**) and the denial of the peace of mind implied in the **coverage** promised in the Release and Settlement Agreement and/or fraud in the inducement to enter into the Release and Settlement Agreement?

3. Is a clause in a Release and Settlement Agreement limiting arbitration to "any disagreement(s)... regarding payment of **claims** for medical expense reimbursement under the Policy" to be given the same broad construction as would a clause providing for arbitration of "any disagreement(s) ... regarding ..." the Release and Settlement Agreement, such that a cause of action for fraudulently inducing petitioners to sign the Release and Settlement Agreement must be arbitrated under both clauses.

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Petitioners Skye Leonard, a Minor by and through his Guardian Ad Litem, Rebecca Leonard; Donald Leonard; Rebecca Leonard; and Brielle Leonard, a Minor, by and through Her Guardian ad Litem, Rebecca Leonard all respectfully request that a writ of certiorari issue to the review the judgment of the United States Court of Appeals for the Ninth Circuit, entered January 14, 2002.

OPINION BELOW

On January 14, 2002, the Court of Appeals for the Ninth Circuit entered its Memorandum reversing the Order of the United States District Court for the Central District of California that denied respondents' motion to compel arbitration.

A copy of this January 14, 2002 Memorandum is attached hereto as Appendix "A"; a copy of the order of the United States District Court for the Central District of California is attached hereto as Appendix "B".

JURISDICTION

The Court of Appeals for the Ninth Circuit entered its Memorandum on January 14, 2002, reversing the Order of the United States District Court for the Central District of California that denied respondents' motion to compel arbitration. Jurisdiction of this court is invoked under Title 28, United States Code section 1254, subdivision (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

"No person shall ... be deprived of life, liberty, or property without due process of law ..." (USCS Const., Amend V.)

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." (USCS Const., Amend VII)

"A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform in whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such contract, transaction or refusal, shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."
(9 U.S.C. § 2.)

STATEMENT OF CASE

This petition seeks review of an opinion finding that causes of action for fraud in the inducement of a Release and Settlement Agreement, and for bad faith breach of that same agreement are arbitrable under a clause mandating arbitration for "any disagreement(s) ... regarding payment of claims for medical expense reimbursement ... under the Policy ..." (App. "A", p. 3a; App. "B", pp. 5a, 7a to 8a.)

In 1982, Donald and Rebecca Leonard purchased a medical insurance policy issued by respondent Equitable. Subsequently, the Leonards had a son, Skye, born a quadriplegic with cerebral palsy. There have been three lawsuits to secure life sustaining medical care for Skye. The first arose when Equitable denied payments for Skye's speech therapy. The Leonards filed suit in the Superior Court of the State of California, and the case eventually settled. (App. "B", p. 6a.)

Following this settlement, Equitable began denying payment for diapers and wipes prescribed by Skye's physicians due to the incontinence that is a medical consequence of Skye's palsy. This resulted in a second case ("Leonard II), also filed in the Superior Court of California, but later removed to the United States District Court for the Central District of California. (App. "B", p. 6a.)

During the course of this litigation, it became apparent that Equitable had marketed the policy to the insureds, knowing that it would fail and planning to surreptitiously and without knowledge of the insureds, transfer low risk insureds out of the class of insureds defined by the policy, thereby increasing the loss rate and allowing the insurer to price the remaining high risk insureds, such as the minor Skye Leonard, out of coverage. (E.R. 25-26; S.E.R. 18-19.)

In June of 1999, the Leonard II case, also settled, pursuant to an agreement that contained the following critical provisions (App. "B", pp. 6a to 7a.)

> 1. That Equitable would make periodic payments to Donald Leonard, Rebecca Leonard, and Brielle Leonard (daughter of Donald and Rebecca) and pay their attorney's

fees, for a total monetary settlement of approximately 2.9 million dollars.

2. That Donald, Rebecca, and Brielle Leonard would terminate their coverage under the policy; and that Skye would remain as the sole insured.

3. That Skye Leonard would be covered for life without any further payment of premiums; and

4. That "[I]n the event any disagreement(s) should arise between Equitable and Claimants regarding payment of claims for medical expense reimbursement under the Policy, including, but not limited to, disagreements regarding whether claims are covered ... " the disagreement would be resolved by arbitration.

Following this June 1999 settlement, toward the end of July, 1999, Equitable sent Donald Leonard a "premium rate increase notice", and, a "notice of premium due", mandating payment of a premium by September 3, 1999. Under the terms of the June 1999 Settlement, no premiums were due. On October 2, 1999, Equitable sent Donald Leonard a "notice" that the policy "is about or has expired" due to the non-payment of the September 3, 1999 premium that, under the terms of the Settlement Agreement, were the responsibility of respondent Equitable. (App. "B" p. 8a.) In November, 1999, again with no claims made for medical expense reimbursement, Equitable told one of Skye's health care providers that coverage had expired in September of 1999. (App. "B", p. 8a.)

Beginning in December of 1999, the Leonards submitted claims that Equitable denied because "this policy lapsed for non-payment of premiums." On February 7, 2000, Equitable's counsel wrote, stating that the statements that the policy had lapsed were erroneous, and, that Equitable was acting to correct the errors. On February 21, 2000, Equitable again refused to pay claims because Equitable stated that the policy had lapsed. (App. "B", pp. 8a to 9a.)

On March 7, 2000, this action was filed, alleging causes of action for bad faith breach of the Release and Settlement Agreement and for Fraud, as well as for bad faith breach of the insurance policy and for the intentional infliction of emotional distress. . (App. "B", pp. 5a, 10a.) Respondent Equitable moved to compel arbitration, and the district court denied the motion. (App. "B", pp. 5a, 12a to 13a.)

Equitable appealed to the United States Court of Appeals for the Ninth Circuit. In a memorandum opinion, filed January 14, 2002, the Ninth Circuit held that the termination of coverage was nothing more than an implicit denial of all future claims, so that all of the Leonards's causes of action were subject to the arbitration clause.
(App. "A", pp. 1a, 3a.)

REASONS FOR GRANTING REVIEW

As indicated by other decisions of this court, the breadth of arbitration agreements is a matter of critical public concern. The scope of the arbitration agreement in this case also has serious implications for the entire insurance industry. Normally, the existence of insurance coverage is supposed to secure "peace of mind", whether or not claims are ever made. (see *Johnson v. Mutual Benefit Life Insurance Co.*, 847 F.2d 600, 602-603 (9th Cir., 1988) [repeated incorrect billing

statements and termination notices deprived plaintiff of peace of mind, with no mention made if any claims had been made].) It is this "peace of mind" that is a crucial component in nearly all advertising for all insurance.

If, as the Ninth Circuit held here, the denial that insurance coverage exists is nothing more than an implied promise to deny claims, then the premise underlying all insurance advertising is false because the advertised "peace of mind", independent of any claims, simply does not exist. Furthermore, and more important, it raises serious concerns about the notice given by arbitration clauses that the clause is waiving the right to a jury trial about specific causes of action. (see *Navellier v. Sletton*, 262 F.3d 923, 943 (9th Cir., 2001) [adequate notice is mandated by due process].)

Fraud is an action at common law. Here, petitioners sued because respondents fraudulently promised them the "peace of mind" implied by the existence of coverage to induce them to sign the Release and Settlement Agreement. Because "peace of mind" is implied into the existence or non-existence of coverage, but not necessarily into the decision on a particular claim, a clause limiting arbitration to "disagreements ... regarding payment of claims ... under the Policy" would not inform the signatories that this clause waives the Seventh Amendment right to a jury trial as to causes of action for denying the "peace of mind", especially when no claims are pending.

The scope that the Ninth Circuit assigned to the arbitration clause in this case is also of grave public concern because, as shown, it effectively obliterates the distinction between coverage and claims by denying legal protection to the petitioners' interest in peace of mind stemming from coverage, even when no claims are pending. There is also

grave public concern because the Ninth Circuit gave the same broad effect (mandating arbitration of causes of action for fraudulent inducement) to a limited arbitration clause as it would to an extremely broad arbitration clause.

The arbitration clause in this case uses several phrases that, at the time the agreement was reached, indicated a limited scope. It is limited to matters "regarding payment ... under the Policy" instead of, for example, "regarding the Settlement Agreement" (see *Simula, Inc. v. Autolive, Inc.* 175 F.3d 716, 721 (9th Cir., 1999).) It is presumed that parties rely on existing case law in drafting arbitration agreements. (*S.A. Mineracao Da Trindade-Samitri v. Utah International, Inc.* 745 F.2d 190, 194 (2nd Cir., 1984).)

The distinction between the coverage provided under the Release and Settlement Agreement and the claims made under the Policy (App. "B", pp. 6a to 7a) also implicate the long standing problem of arbitrating disputes arising under one contract, based on an arbitration clause in another. Courts throughout the country, have repeatedly struggled with the problems of an arbitration clause in one contract, and, a cause of action arising out of a breach of duty imposed by a separate but related contract. with significantly different results, depending upon the jurisdiction interpreting the contract. (*Seaboard Coastline Railroad Co. v. Trailer Train Co.*, 690 F.2d 1343, 1348-1352 (11th Cir;, 1982); *Swenson's Ice Cream Co. v. Corsair Corp.*, 942 F.2d 1307, 1310 (8th Cir., 1991); *Chloe Z. Fishing Co. v. Odyssey re (London) Ltd.*,109 F.Supp.2d 1236, 1254-1255. (S.D., CA, 2000).) Review should be granted so this issue may be authoritatively resolved, with all courts and counsel in the country aware of the appropriate language to use to insure that disputes in one contract are (or are not) subject to an arbitration clause in a different, but related contract.

CONCLUSION

For the foregoing reasons, petitioners respectfully request that this court grant this petition.

Respectfully submitted,

LAW OFFICE OF BALL & YORKE

By: Esther R. Sorkin
Counsel of Record
Attorneys for Petitioners
Skye Leonard, a Minor by and through his Guardian Ad Litem, Rebecca Leonard; Donald Leonard; Rebecca Leonard; Brielle Leonard, a Minor, by and through Her Guardian ad Litem, Rebecca Leonard

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 00-56542

[Filed January 14, 2002]

SKYE LEONARD, a Minor by and through his Guardian ad Litem, REBECCA LEONARD; DONALD LEONARD; REBECCA LEONARD; BRIELLE LEONARD, a Minor by and through her Guardian ad Litem, REBECCA LEONARD,	)
Plaintiffs-Appellees,	)
v.	)
THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,	)
Defendant-Appellant.	)

Appeal from the United States District Court
for the Central District of California
D.C. No. CV-00-02304 AHM
A. Howard Matz, District Judge, Presiding

JUDGES:
Before: O'SCANNLAIN and PAEZ, Circuit Judges, and KING, District Judge.*

MEMORANDUM**

Equitable Life Assurance Society ("Equitable") appeals the denial of its motion to compel arbitration. The facts and prior proceedings are known to the parties; they are not recited herein, except as necessary.

I

Equitable claims that the district court erred in concluding that the Leonards' claims do not fall within the settlement agreement's arbitration provision. The Federal Arbitration Act ("FAA"), 9 U.S.C. §§1-16, "establishes that . . . any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration [when] the problem at hand is . . . construction of the contract['s] language." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25, 74 L. Ed. 2d 765, 103 S. Ct. 927 (1983). In other words, a controversy falls within a valid arbitration clause "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *Marchese v. Shearson Hayden*

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* The Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation.

** This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

Stone, Inc., 734 F.2d 414, 419 (9th Cir. 1984) (internal quotation marks omitted).

The settlement agreement provides for arbitration "[i]n the event any disagreement[s] should arise between Equitable and [the Leonards] regarding payment of claims for medical expense reimbursement under the [health insurance] policy." (second alteration in original). The Leonards' claims fall within this arbitration provision.

The Leonards challenge Equitable's threat to terminate, and then actual termination of the health insurance policy. When Equitable threatened to terminate coverage, it implicitly threatened to deny any future claims under the policy. Similarly, when it terminated the policy, it implicitly denied all future claims. Therefore, "claims for medical expense reimbursement under the policy" are at the heart of the Leonards' suit. Accordingly, the Leonards' claims fall within the arbitration provision.

II

Contrary to the Leonards' suggestion, it is irrelevant that nothing regarding the health insurance policy is in dispute. The arbitration provision is not limited to disputes that involve "the interpretation and performance of the contract itself." *Mediterranean Enters., Inc. v. Ssangyoung Corp.*, 708 F.2d 1458, 1464 (9th Cir. 1983). Rather, the provision covers all disputes that "regard[]" claims for reimbursement under the policy. In other words, the provision captures all disputes that have a "significant relationship" to claims for reimbursement under the policy, even though the policy itself is not in dispute. *Simula, Inc. v. Autoliv, Inc.*,

175 F.3d 716, 721 (9th Cir. 1999). As discussed above, the Leonards' claims bear a significant relationship to medical expense reimbursement under the policy.

III

Finally, we reject the Leonards' contention that paragraph fourteen of the settlement agreement allows for litigation of all disputes regarding the agreement itself. Paragraph fourteen merely provides for attorney's fees for litigation regarding the agreement. It does not guarantee a judicial forum for all disputes regarding the agreement. *See Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24-25.

REVERSED AND REMANDED

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CASE NO. CV 00-2304 AHM (JWJx)

[Filed August 16, 2000]

SKYE LEONARD, et al.,	)
	)
Plaintiffs,	)
	)
v.	)
	)
THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,	)
	)
Defendant.	)
	)

ORDER DENYING DEFENDANT'S MOTION TO COMPEL ARBITRATION

This case is before the Court on the motion of defendant The Equitable Life Assurance Society of the United States ("Equitable") to compel arbitration. Plaintiffs allege causes of action for 1) bad faith breach of insurance contract; 2) bad faith breach of settlement agreement; 3) fraud; and 4) intentional infliction of emotional distress. Equitable contends

that plaintiffs must arbitrate these claims pursuant to an arbitration provision in a June 1999 agreement between the parties.

The Court concludes that the arbitration provision does not encompass plaintiffs' claims in this action. Accordingly, the Court denies defendant's motion.

FACTUAL BACKGROUND

I. The Prior Lawsuits and Settlement Agreement

This is the third lawsuit in this insurer-insured relationship. Plaintiffs are the Leonard family - Donald (father), Rebecca (mother), Brielle (daughter) and Skye (son). Skye is a 12-year old quadriplegic with cerebral palsy. All three disputes have arisen out of defendant Equitable's alleged failures to provide proper coverage for his care.

In 1994, the Leonards sued Equitable in state court alleging that it had improperly denied benefits for Skye's speech therapy. That case settled. In 1997, the Leonards sued Equitable alleging, *inter alia*, that Equitable had improperly refused to pay for medically necessary diapers and baby wipes for Skye. Equitable removed the case to this Court (*Leonard v. Equitable*, CV 97-4586 AHM (CWx)). In June 1999, the Leonards and Equitable executed a settlement agreement and release. The settlement agreement provided that:

> 1. Equitable would make periodic payments to the Leonards and pay their attorneys' fees. The total amount of the payments to the

> Leonards and their counsel is approximately $2.9 million.
>
> 2. Donald, Rebecca and Brielle Leonard would terminate their coverage under the Equitable policy.
>
> 3. Skye would remain as the sole insured. Equitable would provide Skye with coverage for life without any further payment of premiums so long as the Leonards take all necessary steps to secure available government benefits for Skye.

The settlement agreement contains an arbitration provision that states:

> In the event any disagreement(s) should arise between Equitable and Claimants regarding payment of claims for medical expense reimbursement under the Policy, including, but not limited to, disagreements regarding whether claims submitted to Equitable are covered claims under the Policy, and whether Claimants have reasonably pursued and exhausted the governmental benefits referred to in Paragraph 7(d) of this Release, the parties will and hereby do agree to, utilize a neutral third party to resolve said disagreement(s).

At issue in this motion is the scope of the provision that

requires arbitration of "disagreements...regarding payment of claims for medical expense reimbursement under the Policy."

II. Events Leading to This Lawsuit

Following the parties' settlement in June 1999, the following events transpired:

- **July 24, 1999** — Equitable sent Donald Leonard a "premium rate increase notice" informing him that a premium increase would take effect in September 1999.

- **July 30, 1999** — Equitable sent Donald a "notice of premium due." This bill requested that a 3-month premium payment of $2,500 be paid by September 3, 1999.

- **October 2, 1999** — Equitable sent Donald a "notice" that the policy "is about to or has expired" due to non-payment of the September 3 premium.

- **November 11, 1999** — A representative from Rehabilitation Design, a business that provides Skye's medical equipment, sent Donald a fax indicating that an Equitable representative "told me Skye's insurance coverage

was expired as of Sept. 1999, according to their computer."

- **January 11, 2000** — Equitable refused to pay a claim submitted by plaintiffs for Skye's medical treatment because "this policy lapsed for non-payment of the premium due September 3, 1999."

- **January 22, 2000** — Equitable refused to pay another claim for the same reason.

- **January 24, 2000** — Counsel for the Leonards sent a letter to counsel for Equitable informing him of Equitable's actions.

- **January 31, 2000** — Equitable sent plaintiffs a claim denial letter identical to the January 22, 2000 letter.

- **February 7, 2000** — Equitable's counsel responded to plaintiffs' counsel's letter. Counsel apologized for Equitable's mistakes and assured plaintiffs that Equitable was taking action to correct its errors.

- **February 21, 2000** — Equitable sent plaintiffs another denial letter.

- **March 7, 2000** Plaintiffs filed this lawsuit.

Equitable admits that its above-described actions were erroneous. It contends that it has fully paid all of plaintiffs' outstanding claims for benefits and that it has implemented special claims handling procedures for plaintiffs. Equitable also states that it has timely made all other payments to the Leonards and their counsel as required by the settlement agreement.

LEGAL STANDARDS

Defendant moves to compel arbitration of plaintiffs' claims under the Federal Arbitration Act ("FAA"). The FAA provides that a written agreement to arbitrate in a contract involving interstate commerce "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. §2. The effect of §2 is "to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1,24,103 S. Ct. 927, 941, 74 L. Ed. 2d 765 (1983). Section 2 also establishes a "liberal federal policy favoring arbitration," which requires courts to resolve any doubts concerning arbitrability or the scope of arbitrable issues in favor of arbitration, *id.*, and to "rigorously enforce agreements to arbitrate." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221, 105 S. Ct. 1238, 1242, 84 L. Ed. 2d 158 (1985). However, "[a]rbitration is a matter of contract, and a party cannot be required to submit any dispute which he has not agreed so to submit." *AT&T Technologies, Inc. v. Comm. Workers*, 475 U.S. 643, 648 (1986).

DISCUSSION

The issue here is whether plaintiffs' claims constitute disagreements "regarding payment of claims for medical expense reimbursement under the Policy" and are therefore arbitrable. The sequence of events leading up to this lawsuit is important. On July 24, 1999, Equitable sent plaintiffs a premium rate increase notice. On July 30, Equitable sent plaintiffs a bill for premiums allegedly owed under the Policy. When plaintiffs did not pay that bill, Equitable followed up with a second notice on October 2 informing plaintiffs that the Policy "is about to or has expired."

None of these actions was in response to any claim of any plaintiff for benefits. Indeed, plaintiffs had not made any claims for benefits following execution of the settlement agreement as of the point when Equitable demanded a premium payment and threatened to cancel the Policy. Thus, plaintiffs' claims do not fall with in the scope of the arbitration clause "regarding payment for claims of medical expense reimbursement." It is certainly true that defendant's improper cancellation of the policy ultimately resulted in Equitable's refusal to pay claims under the Policy. But that does not change the fact that plaintiffs' claims arose out of Equitable's allegedly tortious demands for premium payments and its cancellation of the policy when plaintiffs did not pay the improperly-demanded premiums.

Both in the moving papers and at the July 17, 2000 hearing on this motion, defense counsel argued that plaintiffs should be compelled to arbitrate based on the Ninth Circuit's decision in *Simula v. Autoliv*, 175 F. 3d 716 (9th Cir. 1999). *Simula* involved a license agreement for an automobile air bag

system executed by American and German business entities. The licensor later filed suit alleging, *inter alia*, claims for antitrust and trademark violations and trade secret misappropriation. The defendant moved to compel arbitration pursuant to a provision in the license agreement that required the parties to arbitrate all disputes "arising in connection with" the agreement. The Ninth Circuit held that the arbitration agreement encompassed "every dispute between the parties having a significant relationship to the contract and all disputes having their origin or genesis in the contract" and found that the plaintiff's claims were arbitrable. *Id.* at 721.

Simula is distinguishable from the instant case in at least two important respects. First, the arbitration clause here is narrowly tailored. It includes only disputes "regarding payment of claims for medical expense reimbursement under the Policy," not, for example, all disputes regarding whether the Policy remained in effect or disputes arising in connection with the settlement agreement generally. Thus, this arbitration provision is narrower than the provision in *Simula,* which required arbitration of *all* disputes arising in connection with the parties' agreement. Moreover, *Simula* involved a contract between foreign entities and the Court of Appeals noted that the federal policy favoring arbitration "applies with special force in the field of international commerce." *Id.* at 726.

In sum, the Court concludes that plaintiffs' claims cannot fairly be characterized as disagreements "regarding payment of claims for medical expense reimbursement under the Policy."

CONCLUSION

For the foregoing reasons, and good cause appearing therefor, the Court DENIES defendant's motion.

IT IS SO ORDERED.

/s/ _____
A. Howard Matz
United States District Judge

DATE: August 16, 2000